IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-57

CANADIAN ACE BREWING CO.,
Petitioner,

v.

ANHEUSER-BUSCH, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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OPINIONS BELOW

The orders of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the District Court (Pet. App. 1-2) and denying the Petition for Rehearing *In Banc* (Pet. App. 23) are not reported. The opinion of the United States District Court for the Northern District of Illinois on the dismissal of Petitioner's complaint (Pet. App. 3-10) is reported at 448 F. Supp. 769.

JURISDICTION

The order of the Court of Appeals affirming the judgment of the District Court was entered on March 6, 1979. A timely Petition for Rehearing *In Banc* was denied on April 18, 1979 (Pet. App. 23). The petition

for a writ of certiorari was filed on July 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the courts below correctly construed § 94 of the Illinois Business Corporation Act, Ill. Rev. Stat. ch. 32, § 157.94, in concluding that Petitioner, formerly an Illinois corporation and which was voluntarily dissolved on December 6, 1972, lacked capacity to sue as of the date of the filing of this action on November 11, 1977, notwithstanding allegations of fraudulent concealment and/or equitable estoppel contained in Petitioner's complaint.

STATUTE INVOLVED

Section 94 of the Illinois Business Corporation Act, as amended, Ill. Rev. Stat. ch. 32, § 157.94, provides:

> The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the Secretary of State, or (2) by the order of the court when the court has not liquidated the assets and business of the corporation, or (3) by expiration of its period of duration, shall not take away or impair any remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name.

STATEMENT OF THE CASE

Petitioner Canadian Ace Brewing Company filed this antitrust action against Respondent Anheuser-Busch, Inc. on November 11, 1977, nearly five years after Petitioner's voluntary dissolution under Illinois corporate law on December 6, 1972. The complaint alleged violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), which were claimed to have commenced at least as early as 1964. The jurisdiction of the District Court was invoked under § 4 of the Clayton Act, 15 U.S.C. § 15.

Respondent moved to dismiss the complaint on the ground that as a matter of Illinois corporate law, a dissolved Illinois corporation lacks capacity to institute any action more than two years after its dissolution. Illinois Business Corporation Act, § 94, Ill. Rev. Stat. ch. 32, § 157.94. In opposition to Respondent's motion, Petitioner contended that Respondent's alleged "fraudulent concealment" of Petitioner's alleged claims "tolled" the two-year post-dissolution period during which a dissolved Illinois corporation has capacity to sue.

The District Court, sitting in Illinois, dismissed the complaint, holding that under the Illinois statute, a dissolved Illinois corporation has no capacity to institute any action more than two years after its dissolution. The District Court held further that Petitioner's self-styled allegations of "fraudulent concealment" could not, in light of the plain language and purposes of § 94, "toll" the two-year post-dissolution period during which Petitioner had capacity to sue (Pet. App. 3-10).*

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* Both the District Court and the Court of Appeals properly took the allegations of Petitioner's complaint as true for the purpose of ruling on Respondent's motion to dismiss. Respondent, of course, has no objection to that procedure. We do take strong exception, however, to Petitioner's reckless use of the term "admitted" and related characterizations with respect to the status of the allegations of the complaint. Respondent has not admitted, does not admit and, indeed, categorically denies both Petitioner's antitrust claims and its charges of fraudulent conduct.

On appeal, Petitioner for the first time contended that "equitable estoppel," rather than "fraudulent concealment," provided the basis for avoiding the capacity bar of the Illinois statute. Notwithstanding Petitioner's contentions, after full briefing and oral argument a unanimous panel of the Court of Appeals affirmed the District Court's dismissal of Petitioner's complaint (Pet. App. 1-2).

Petitioner reasserted its "equitable estoppel" argument on petition for rehearing *in banc*. In answer to the petition, Respondent argued that the alleged estoppel issue was not properly before the Court because of Petitioner's failure to raise it in the District Court; that even if not untimely, Petitioner had failed to plead an equitable estoppel; and that, in any event, the same reasoning which required rejection of Petitioner's "fraudulent concealment" argument required rejection of its belated "estoppel" theory as well. On April 18, 1979, the petition for rehearing *in banc* was denied, the panel having voted to deny rehearing and no judge of the Court of Appeals having requested a vote on the suggestion for rehearing *in banc* (Pet. App. 23).

ARGUMENT

The petition presents no question warranting review by this Court. As Petitioner concedes (Pet. at 3, n. 2), this case involves solely a question of Illinois state law, the correct construction of § 94 of the Illinois Business Corporation Act. Petitioner's arguments were fully heard by the District Court, sitting in Illinois, which ruled that Petitioner's proposed construction of the Illinois statute was both contrary to its plain language and would lead to a result inimical to its purposes. The members of the three-judge panel of the Court of Appeals (Sprecher, Tone and Wood, JJ.), all of whom practiced in Illinois and two of whom sat in the District Court in Illinois

prior to their appointment to the Seventh Circuit, unanimously agreed with the conclusion of the District Court and affirmed the dismissal of Petitioner's complaint. Under these circumstances, the Court should "follow [its] general policy and leave undisturbed this Court of Appeals holding on a question of state law." *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 708 (1949).

In any event, the decision below is fully consistent with the decisions of the Illinois courts and of this Court regarding a dissolved corporation's capacity to sue. As stated in *People* v. *Parker*, 30 Ill. 2d 486, 197 N.E.2d 30 (1964):

> There is no dispute that by the common law doctrine of the status of a corporation after its dissolution for any cause, the corporation has no legal existence, and the real estate held by the dissolved corporation reverts to the grantors or donors, and the personal property escheats to the king, and that no right of action can be maintained to enforce a claim against the defunct corporation. In the United States, however, this common law doctrine has been so modified that the property of a dissolved corporation is to be used for the benefit of the creditors and stockholders after dissolution, and generally, by a saving clause, stockholders or creditors may maintain an action for that purpose, *and in order to maintain an action it must be filed within the time fixed for such purpose.* (197 N.E.2d at 31, quoting *Consolidated Coal Co.* v. *Flynn Coal Co.*, 274 Ill. App. 405, 411 (1934); emphasis supplied.)

Accord, *Markus* v. *Chicago Title & Trust Co.*, 373 Ill. 557, 27 N.E.2d 463 (1940); *Koepke* v. *First National Bank of DeKalb*, 5 Ill. App. 3d 799, 284 N.E.2d 671 (1972); *O'Neill* v. *Continental Illinois Co.*, 341 Ill. App. 119, 93 N.E.2d 160 (1950); *Ruthfield* v. *Louisville Fuel Co.*, 312 Ill. App. 415, 38 N.E.2d 832 (1942); *Sarelas*

v. *McCue & Co.*, 291 Ill. App. 540, 10 N.E.2d 700 (1937); *Consolidated Coal Co.* v. *Flynn Coal Co.*, 274 Ill. App. 405 (1934); *Dukes* v. *Harrison & Reidy*, 270 Ill. App. 372 (1933).

Similarly, as this Court held in construing predecessor statutes identical in effect to the present § 94 insofar as relevant here:

> The decisions of this court are all to the effect that a private corporation in this country can exist only under the express law of the state or sovereignty by which it was created. Its dissolution puts an end to its existence, the result of which may be likened to the death of a natural person. There must be some statutory authority for the prolongation of its life, even for litigation purposes.
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> * * * *
>
> It is plain enough, under the Illinois statute, that after the expiration of two years from the date of its dissolution, respondent was without legal capacity to initiate any legal proceeding . . . (*Chicago Title Trust Co.* v. *Forty-One Thirty-Six Wilcox Building Corp.*, 302 U.S. 120, 124-26 (1937).

Furthermore, there is no conflict between the decision below and the decisions in *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959), and *Bomba* v. *W. L. Belvidere, Inc.*, 579 F.2d 1067 (7th Cir. 1978), on which Petitioner relies. Neither of those cases involved the capacity of a dissolved corporation. In each case, the issue was whether equitable estoppel could apply (based on factual allegations far different than those involved here) with respect to a so-called "substantive" statute of limitations. Even if § 94 were a statute of limitations, which it is not, *People* v. *Parker*, *supra*, 197 N.E.2d at 31, *Glus* and *Bomba* would be inapplicable here because in neither case was the court required to

harmonize the application of an estoppel with the purposes underlying a corporate survival statute like § 94.

The decisions construing such statutes leave no room for doubt that application of an estoppel theory to allow a suit by a dissolved corporation beyond the specified point in time would be contrary to their purpose. The courts have repeatedly recognized that corporate survival statutes are based on the need for "a definite point in time at which the existence of a corporation and the transaction of its business are terminated." *Johnson* v. *RAC Corp.*, 491 F.2d 510, 512 n. 3 (4th Cir. 1974); *Litts* v. *Refrigerated Transport Co.*, 375 F. Supp. 675, 677 (M.D. Pa. 1973); *Bishop* v. *Schield Bantam Co.*, 293 F. Supp. 94, 96 (N.D. Iowa 1968). Thus, as stated in *Gordon* v. *Loew's, Inc.*, 147 F. Supp. 398, 408 (D.N.J. 1956), *aff'd on other issues*, 247 F.2d 451 (3d Cir. 1957), § 94 is

> a statement of the public policy of the State of Illinois that remedies available to a corporation or its shareholders prior to its dissolution may be enforced only within two years after such dissolution.

See also Galter v. *Federal Trade Comm'n*, 186 F.2d 810, 816 (7th Cir.), *cert. denied*, 342 U.S. 818 (1951) (recognizing public policy foundation of limited extension of corporate life embodied in § 94).

Neither in its Petition nor at any other point in this litigation has Petitioner even attempted to reconcile its proposed construction of § 94 with this statutory purpose. The reason, quite clearly, is that no such reconciliation is possible.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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